No. 82-1324

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

THE NATIONAL FARMERS' ORGANIZATION, INC.,
Petitioner,
v.
ASSOCIATED MILK PRODUCERS, INC.,
MID-AMERICA DAIRYMEN, INC., and
CENTRAL MILK PRODUCERS COOPERATIVE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF THE NATIONAL FARMERS' ORGANIZATION, INC.

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With the exception of a couple of "afterthought" passages, the Respondents do not really challenge the legal proposition that a lawsuit need not be "groundless" to support a claim that it was unprotected "sham litigation." Indeed, for the most part, they enthusiastically embrace the principle that the sham issue turns on whether the intent is to harm the competitor by the mere fact that the litigation is brought, rather than by the successful litigation of the merits of the case. This is precisely the point (1) urged by Petitioner, Petition at 12; (2) urged by Bork, *The Antitrust Paradox*, 358 (1978); and (3) adopted by Judge Posner in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982):

* The National Farmers' Organization, Inc., has no parent or subsidiaries and its affiliates were identified in its Petition for a Writ of Certiorari in Docket No. 82-1324.

> The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating.

Id. at 472.

Respondents say the controlling principle is enunciated in *Gainesville v. Florida Power & Light Co.*, 488 F. Supp. 1258 (S.D. Fla. 1980),[1] which states that mere intention to harm a competitor is not enough to make litigation "sham." *Id.* at 1265. We agree, because the *Gainesville* court then went on to state that

> . . . the requisite motive for the sham exception is the intent to harm one's competitors not by the *result* of the litigation but by the simple *institution* of litigation.

Ibid. (emphasis in original).

Respondents AMPI and CMPC also concur.[2] They argue that under *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), litigation is actionable if it is undertaken not to obtain a government action—success on the merits—but to achieve a collateral effect—in that case barring competitors from access to tribunals—by the mere fact of intervening.

Measured against this principle, the only avenue of escape left to the Respondents is an attempted re-write of the Court of Appeals' decision to make it say that their litigation campaign was not brought for such anticompetitive collateral purposes. AMPI and CMPC baldly interpret the Eighth Circuit's opinion as follows:

> The court thus concluded that the respondents had not initiated the litigation in bad faith.

AMPI and CMPC Opposition Brief at 5. Mid-America goes further and says both courts below "held that the

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[1] Cited in Mid-America Opposition Brief at 8.

[2] AMPI and CMPC Opposition Brief at 8.

respondent's litigation was instituted upon probable cause or in good faith." Mid-America Opposition Brief at 6. These characterizations of the Eighth Circuit's decision, however, dissolve in the face of that Court's specific findings that the litigation was brought to hamper NFO's ability to compete by burdening it with litigation costs, that Mid-America selected a class action mode in order to keep NFO from contacting the farmers they were competing for and that the fact of the suit was used as a pretext for threatening and intimidating NFO's customers. (687 F.2d at 1200; App. 46a-47a.) These are all unequivocal findings that the suits were brought for the purpose of inflicting the various collateral injuries on NFO, not a one of which depended in any way upon the litigated "result" (*Gainesville*) or "outcome" (*Grip-Pak*).

Ignoring these clear findings of collateral anticompetitive purpose, Respondents fasten on the Eighth Circuit's statement that there were "genuine disputes" as to NFO's methods and that the claims were not "so groundless" as to be sham. (687 F.2d at 1200; App. 45a.) These statements, going only to the colorability of the suits against NFO, are transmuted through some mysterious process into a finding that the claims were not brought in bad faith. In fact, all these statements deal with is the issue of whether the suits had any trace of merit; they in no way disturb the court's specific findings that the suits were brought to inflict the collateral injuries listed above. These are findings of bad faith as a matter of law.

The balance of Respondents' arguments require little attention. As to sponsoring third-party litigation to "break NFO's back," Petitioners ignore what the court found[3] and acquit themselves both of sponsorship and of bad faith. AMPI and CMPC Opposition Brief at 5-6. It is obvious that the finding as to bad faith only relates to the third party's intent, not AMPI's. Even Respondents'

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[3] 687 F.2d at 1200; App. 45a.

fertile imaginations cannot suggest what AMPI was doing this for, other than to oppress NFO.

Mid-America also argues, and provides a laundry list of cases to prove, that probable cause is always a factor to be considered in sham litigation cases. Mid-America Opposition Brief at 6. Obviously, if a suit lacks any merit this is evidence that it was brought for a collateral purpose.[4] There is no need to resort to such evidence, however, when Respondents' own admissions, and the court's findings, unequivocally demonstrate that the litigation *was* intended to achieve anticompetitive collateral purposes.

Finally, Respondent Mid-America argues that any suit against a competitor has to have anti-competitive intent, because a damage award would necessarily weaken the competitor and so a "groundlessness" rule is needed or else competitors will never sue competitors. Mid-America Opposition Brief at 8. Here, however, the Eighth Circuit found that the Respondents intended to hurt NFO just by bringing and subsidizing litigation, regardless of whether they prevailed on the merits. Mid-Am's professed concern for competitors' access to the courts is, in this context, a red herring.

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[4] "The number of lawsuits filed without success is itself circumstantial evidence of sham." Coastal States Marketing, Inc. v. Hunt, 1982-83 Trade Cas. (CCH) ¶ 65,140, 71,473, n. 37 (5th Cir. 1983).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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